MONTANA
Management View

An electronic newsletter for the state government manager from the Labor Relations Bureau

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Health premiums to remain stable in 2004; deductibles will rise while options decline

State employees can avoid out-of-pocket increases in health insurance premiums next year, but deductibles will rise, and plan options will decline. This is the result of recent changes intended to keep the self-insured health plan funded at levels required by law, while simultaneously ensuring members with family coverage in 2004 will not get hit with large increases in out-of-pocket monthly premiums. The major change in medical plans for the 2004 plan year is the elimination of the Basic plan and the Medicare Coordinated plan.

Employees can still choose between the Traditional plan and one of three Managed Care plans, depending on the availability of managed care within certain geographic areas. The State Employee Group Benefits Advisory Council (SEGBAC) directed these changes in a September meeting with staff of the Employee Benefits Bureau. The yearly deductibles for the Traditional plan will rise (from $435 per plan members and $1,305 per family in 2003) to new levels of $550 per plan member and $1,650 per family in 2004. The Managed Care plans have lower deductible levels of $400 per member and $800 per family.

Highlights

Most employees will see no out-of-pocket increases in premiums, depending on their selected medical plans. In some cases, employees may experience a premium reduction. The state's monthly contribution toward health benefits for employees will increase by $44 (to $410 per month) in 2004. Employees covering only themselves will

have additional "state share" money, which they can put into a medical flexible spending account or toward the purchase of other benefits including paying out-of-pocket premium costs. Retiree premiums did not increase the full $44 per month. Some retirees may still see an increase in premiums, but the increase is substantially lower than anticipated.

Plan members will receive detailed information regarding the benefits available for 2004, and will have the opportunity to change their insurance elections during the annual change election period beginning October 6, 2003. The deadline to make changes for the 2004 benefit year is October 31, 2003. For further information regarding benefits, contact the Employee Benefits Bureau at 444-7462 (in Helena) or 1-800-287-8266.

State employee groups can vote to use sick leave payout for health and medical expenses

Beginning October 1, 2003, public employee groups may vote to participate in a VEBA (voluntary employee beneficiary association). VEBAs allow participants to contribute, through their employer, funds on a pre-tax basis for qualified medical and health expenses and premiums outlined in IRS code. There are several potential funding sources for VEBAs including sick leave cash outs, percent of raise contributions, and unused employee benefit dollars. Last week, the Governor's budget office directed the Employee Benefits Bureau to implement a VEBA option for executive branch employees based on the minimum contribution specified in state law (cash out for one-quarter sick leave at termination).

The Employee Benefits Bureau is charged with the VEBA program design for most public employees in the state of Montana. Bureau staff and contracted educators are available now to explain the program to any public employee group. Contact the Employee Benefits Bureau at 444-3871 for more information or visit their website at:
www.discoveringmontana.com/doa/spd/benefits/veba.asp

Dealing with drug and alcohol problems

Managers in state government sometimes must correct an employee whose misconduct is related to abuse of alcohol or other drugs. These situations are usually difficult. As with any corrective action, the manager often has an obligation to give the employee a chance to correct the problem. The extent of this obligation correlates to the severity of the misconduct and the chances for recovery. Any disciplinary penalty should be considered in relation to the impact of the employee's misconduct upon the agency's business operation or reputation. In arbitration, management will need to prove how the severity of the penalty reasonably fit the severity of the disruption or embarrassment the employee inflicted upon the agency's business operation.

Alcohol and drug cases take complicated twists and turns for various reasons. A few primary considerations are examined below. ***(See summary of Montana state government cases in the Arbitration Roundup on page 5 of this newsletter.)***

Alcohol vs. other drugs

Arbitrators have increasingly viewed alcoholism as a treatable disorder. They frequently expect employers to accommodate reasonable employee efforts toward rehabilitation. The definition of "reasonable" efforts toward rehabilitation can seem elusive. In any event, there seems to be a growing consensus among arbitrators and treatment specialists that the employee with alcohol-related problems should be held accountable.

There is no dispute that an alcoholic is ultimately dischargeable for misconduct or poor performance *(Alcohol and Other Drugs: Issues in Arbitration; Denenberg & Denenberg; Bureau of National Affairs)*. As even the "Big Book," the bible of Alcoholics Anonymous, says to employers: "If he wants to stop drinking, he should be afforded a real chance. If he cannot or does not want to stop, he should be discharged." The tough question is, what is a "real" chance? Some general answers, and three models or "schools of thought," appear later in this article.

Looking at "other drugs" besides alcohol, arbitrators seem to put less of a burden on management to accommodate the rehabilitation of employees whose dependency on illicit drugs interferes with job performance.

Looking at "other drugs" besides alcohol, arbitrators seem to put less of a burden on management to accommodate the rehabilitation of employees whose dependency on illicit drugs interferes with job performance. One reason is alcoholism is probably a more familiar disorder than other forms of chemical abuse. Another reason is some drugs (e.g., marijuana, methamphetamine, cocaine) have been primarily associated with younger members of the work force. Managers, union leaders, and arbitrators, who are generally more senior, might be less familiar with addictions to illicit drugs and less sympathetic toward employees with related misconduct and performance problems *(Ibid; Denenberg & Denenberg)*.

Arbitrators lean toward upholding discipline when drug-related misconduct turns criminal, such as driving under the influence of alcohol while on duty (or off-duty in limited circumstances), or possessing or selling illegal drugs. The important issue is whether such conduct, on-duty or off-duty, significantly disrupts the agency's business operation or causes damaging embarrassment to the

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reputation of the agency. Circumstances are specific to the job. For instance, the employer and an arbitrator would likely view the hypothetical case of a clerical worker at a university who commits off-duty DUI differently than the hypothetical case of a highway patrol officer who commits off-duty DUI. To uphold discipline for off-duty misconduct, an arbitrator must be convinced the off-duty misconduct damaged the employee's ability to perform the required duties and responsibilities of the job in a credible, reliable and trustworthy manner. *(See the April 2002 issue of Management View; "Employees charged with crimes;" page 3)*
http://www.discoveringmontana.com/doa/spd/EmployeeLaborRelations/Newsletter5April2002.pdf

Three schools of thought on alcoholism: (1) *discipline;* (2) *therapy;* (3) *modified discipline.*

Arbitrators seem to display a variety of attitudes toward cases involving alcoholism. Here are three main "schools of thought" described in the aforementioned text, *"Alcohol and Other Drugs,"* published by the Bureau of National Affairs.

Straightforward application of the traditional corrective discipline model. Employees are judged solely on the basis of their performance on the job without regard to clinical explanations of their shortcomings. Discharges, even of employees suffering from alcoholism, are imposed so long as the employer has adhered to the disciplinary requirements of the collective bargaining agreement.

Rejection of the corrective disciplinary model in favor of a therapeutic model. The alcoholic employee is deemed to be the victim of a disorder and is offered opportunities to recover, including leaves of absence and appropriate treatment. Repeat offenses are not necessarily regarded as cause for increasingly severe penalties but as perhaps inevitable slips on the long road to recovery. Failure implies the need for more treatment, not more punishment.

Modification of the corrective discipline model. This middle-ground approach operates on the theory that the employee suffers from an illness but ultimately may be subject to discharge, perhaps after being given one "second chance," and allows for some opportunity for recovery while insisting that employees remain substantially accountable for their behavior.

None of the three approaches described above is entirely free of difficulties, either conceptual or practical. The more closely one adheres to the *corrective discipline model*, the more one confronts the realization that alcoholism is often a hidden condition underlying the superficial behavior (such as tardiness or

The more closely one adheres to the corrective discipline model, the more one confronts the realization that alcoholism is often a hidden condition underlying the superficial behavior (such as tardiness or absenteeism).

absenteeism) for which the employee ostensibly is being disciplined. The *therapeutic model* can be difficult to apply because techniques for treating alcoholism vary considerably and are still being developed. The *middle-ground approach* also is not trouble-free, inasmuch as it tries to combine two often-conflicting elements – punishment and treatment.

The Arbitration Roundup section in this issue of Management View looks at two cases from state government: (1) the case of an employee who "smelled heavily of alcoholic beverages," disrupting the work place with his foul body odor, and; (2) the case of an employee convicted of an off-duty drug-related felony crime.

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

The case of the "noxious" smelling computer tech

The grievant was an employee in an information technology position in Montana state government. His job was to help other department employees at their workstations when computer questions or problems arose. His duties included configuration, installation and maintenance of hardware and software systems. He eventually started coming to work smelling of alcohol and foul body odor. Co-workers complained to management. Management viewed the employee as capable and energetic in his job duties, however, the complaints about his smell from co-workers were credible.

Management issued him a written warning that included the following admonition: *"The smell of alcohol was strong enough and pervasive enough to cause class participants in your immediate area to feel uncomfortable, even ill. Several members of the class asked the instructors for a change in seating assignment for this reason. The strong alcohol smell persisted throughout the day, and some participants believed the smell was renewed in the afternoon."* The document warned the grievant to correct the situation, ending with the phrase, *"Failure to comply may result in further disciplinary action, up to and including termination."* The employee did not grieve the warning. In the employer's discussions with the employee, he acknowledged he regularly consumed alcohol off-duty, but denied ever consuming or being under the influence of alcohol while on the job. He indicated he might have a problem with alcohol. Managers counseled him and notified him of resources available through the employee assistance program.

Four months after the above incident, a co-worker complained to management about the grievant smelling bad again. Five months after this new complaint, another co-worker complained to management about the grievant's smell. Management suspended the grievant for five days without pay.

This written warning accompanied the suspension: *"It seems evident that you are aware of alcohol as a problem in your life. Let me be very clear, however, about the potential effects on your work here. Should you come to work under the influence of alcohol, or should you come to work with an alcohol smell strong enough to be noticed by or bother your co-workers, you will be terminated from employment."* Management again reminded the employee of resources available through the employee assistance program. He did not grieve the suspension.

Two months after the disciplinary suspension, a co-worker complained about the noticeable smell of alcohol on the employee. Management investigated. Other co-workers confirmed they, too, smelled alcohol on the employee. Management held a due process meeting with the employee to present evidence of the infraction and to give him an opportunity to tell his side of the story. He did not deny the allegations or discuss any desires or efforts at treatment. The agency discharged him. The union grieved.

Arbitrator Kent J. Collings upheld the discharge for just cause. *"The grievant was technically an outstanding employee,"* Collings wrote. *"His knowledge of computers and his ability to help others eliminate bugs in their equipment was frequently brought out in the hearing …. The job description and the modus operandi provided that the grievant be in close contact with other employees a good part of the time. It is in this part of his job that the grievant fell short …. While noxious smell is not as serious as being drunk on the job or drinking on the job, it is still a serious problem affecting co-workers and productivity. It is the arbitrator's personal feeling that more might have been done to save this extremely able employee; however, it is the arbitrator's duty only to interpret the contract. Was there just cause here (for discharge)? Yes."*

The case of the drug dealer at the rehab center

The grievant was a laundry worker at a former state facility that operated a drug and alcohol rehabilitation program. The former facility no longer exists because of program reorganization and relocation in the early 1990's. All employees of the facility were subject to the employer's drug-free workplace policy. The facility depended upon federal funds that required strict compliance with rules prohibiting employee drug use. The facility also relied upon state funds, requiring the facility to maintain a good reputation among legislators, the courts, and members of the public.

The event that triggered the grievant's discharge was the appearance in the local newspaper of the grievant's plea bargain to two felony counts of possession of dangerous drugs with intent to sell. The crime occurred off-duty and away from the work place. The court did not send the grievant to prison, but imposed a three-year suspended sentence, placed the grievant on supervised probation and fined him $500. Further, the court required the grievant to undergo chemical dependency evaluation and treatment. The employer discharged the grievant immediately upon obtaining a copy of the court order regarding the specifics of the grievant's plea bargain. The union grieved.

Arbitrator Jack Flagler upheld the discharge for just cause. The criminal conduct of possessing or selling illegal drugs away from the work place does not constitute automatic grounds for employment termination, Flagler ruled. To justify discharge, the employer *"must establish a nexus between the workplace and the off-duty, off-premise criminal activity"* associated with illegal drugs.

"The employer succeeded in establishing a nexus in this case," Flagler wrote. *"The employer presented evidence showing that the grievant's conviction became public knowledge because of its media coverage. The union argues such publication could not have adversely affected the employer's reputation because the newspaper reports nowhere mentioned the grievant's employment with the employer. This argument ignores the fact this district court area covers a relatively sparse population density where the grievant's name in connection with a felony drug conviction would likely have been recognized by fellow employees and some patients as well as their families."*

"The most salient argument heard from the employer concerns the possible political and budgetary fall-out from this adverse publicity," Flagler wrote. *"Unfortunately for the (facility's) reputation – upon which it must rely to survive in the competition for limited public revenues – such a public scandal could provide substantial political advantage to those seeking to curtail or even eliminate funding of the (facility's) mission. The employer not only has the right but the responsibility to protect the institution, its patients and its employees from this very real potential for severe consequences of the grievant's criminal activities. Little forgiveness would likely be given to the employer by the public at large or some legislators in particular if the media were to seize on the information that the employer knowingly continued in its employ a person convicted of felonious sales of dangerous drugs."*

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Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/css

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